Petition

81-329

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

SWANSBORO COUNTRY, INCORPORATED,
Petitioner,

VS.

LUMBERMAN'S MORTGAGE COMPANY,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Shall Federal Courts, in a bankruptcy proceeding, be permitted to order strict foreclosure of the interest of a buyer of real property under an installment contract of sale when state law prohibits strict foreclosure?

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Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices Of the Supreme Court of the United States:

Swansboro Country, Incorporated, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered April 10, 1981; petition for rehearing denied May 18, 1981.

OPINIONS BELOW

The opinion of the Ninth Circuit is unreported and is reproduced in Appendix A attached hereto, beginning on page A-1. The petition for rehearing was denied without opinion.

Petitioner's appeal to the United States District Court for the Northern District of California was denied without opinion.

The opinion of the United States Bankruptcy Court and its supplemental opinions are unpublished and are reproduced as Appendix B and C, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered April 10, 1981. A timely petition for rehearing was denied May 18, 1981. This petition is filed within 90 days of that date.

The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1).

STATEMENT OF THE CASE

Swansboro is the buyer of real property under an installment contract of sale.

Lumberman's Mortgage Company, a debtor in Chapter 11 bankruptcy proceeding, is the seller.

Lumberman's filed an action in the bankruptcy court contending that Swansboro was in default under the contract and seeking to quiet title to the real property in its own name. Swansboro counter claimed seeking to cure its default and to complete the contract.

At trial it was undisputed that the land sale contract in question was intended by the parties as a security device—i.e. Lumberman's retained title only as a mortgagee. It was undisputed that Swansboro paid in excess of $700,000.

Swansboro contended that California law granted it, as the buyer, an absolute right to cure its default and complete the contract. Disputes as to the amounts owing, Swansboro contended, were to be resolved by the bankruptcy court.

Instead, the bankruptcy court viewed the applicable law as permitting cure by Swansboro only if Swansboro had substantially performed. The court concluded that performance had not been substantial and quieted title in Lumberman's. The District Court and then the Ninth Circuit affirmed, holding that the finding of the bankruptcy court with regard to performance was not clearly erroneous.

REASON FOR GRANTING THE WRIT

In a troubled economic climate, with increasing numbers of defaults on mortgages and increasing numbers of bankruptcy filings, it is essential that Federal Courts correctly apply state laws which protect the equity of mortgagors.

California law protects this equity in the context of installment land sales contracts by requiring the court to determine the amount then owing and to allow the buyer an opportunity to cure. See *Peterson v. Ridenour* (1955) 135 Cal.App.2d 720 where the court observed:

> "A quiet title action brought to terminate a contract of sale for realty is essentially a strict foreclosure (*Warner Brothers Company v. Freud*, 138 Cal. 651, 654; 27 Cal. L. Rev. P. 584, N. 6). And in 'such case the court finds the amount unpaid, and decrees that it be paid on or before a day stated, and upon failure to make the payment that defendant's equity be foreclosed' " 135 Cal.App.2d at 728.

Peterson was approved and followed by the Court of Appeals for the Ninth Circuit in *Ward v. Union Bond and Trust Company* (1957) 243 Fed.2d 476. In that case, the Ninth Circuit granted a willfully defaulting debtor the right to cure his default and complete his contract. See Footnote 7.

In *MacFadden v. Walker* (1971) 5 Cal.3d 809, the California Supreme Court, citing both *Peterson* and *Ward*, held that that buyer of real property under a contract of sale intended as a security device will be given an opportunity to cure even when substantial performance is not proven. The court observed:

> "Finally, we note again, as we also did in the *Honey* case, Professor Hetland's persuasive arguments that installment land sale contracts be treated as security devices substantially on a par with mortgages and deeds of trust, and that therefore 'the law governing those security devices should be adopted with appropriate modifications in determining the remedies for breaches of installment contracts' *That law affords even the willful defaulting debtor an opportunity to cure his default before losing his interest in the security.*" Emphasis added and citations omitted) 5 Cal. 3d at 816.

In the present case the Ninth Circuit, in its opinion, construed California law to allow cure only on a showing of substantial performance, that is, only on a showing of the kind of performance which would create an unjust enrichment should the seller be allowed to quiet title and retain the property. Such, is not the rule in California for as the Supreme Court observed in *MacFadden*, supra, it may be

impossible for the buyer to prove that the seller will be unjustly enriched by allowing him to retain the property together with the payments made.

Permitting bankruptcy courts to foreclose the equity of buyers under installment land sales contracts and other mortgages will thwart long standing state policies designed to protect secured borrowers. It should not be allowed.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STEPHEN B. R. KELLER
KELLER & PACCASSI
Attorneys for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 79-4041
D.C. No. C-78-1822-CBR

Lumbermans Mortgage Company,
Plaintiff-Appellee,

vs.

Swansboro Country, Inc.,
formerly known as W&D Investment Co., Inc.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

Charles B. Renfrew, District Judge, Presiding

Argued & Submitted: November 12, 1980

[Filed April 10, 1981]

MEMORANDUM

Before: GOODWIN, NORRIS, and PECK,* Circuit Judges

Swansboro appeals from an order of the district court affirming the bankruptcy court's judgment quieting title in the Lumbermans Mortgage Company to property which was the subject of an installment land sale contract between Swansboro and Lumbermans. Appellant claims it is

*John W. Peck, Senior United States Circuit Judge, Sixth Circuit.

entitled to specific performance upon payment of amounts due under a theory of equity of redemption.

Under the applicable law of California, the doctrine of equitable redemption allows a defaulting purchaser in an installment land sale contract who has made substantial part performance or has made substantial improvements in reliance on his contract to cure his default and reinstate the contract. *See McFadden v. Walker*, 5 Cal. 3d 809 (1971); *Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957). The purpose of the doctrine is to avoid a forfeiture of money paid by the defaulting buyer and prevent the unjust enrichment of the seller. *Id.*

As we read the bankruptcy court's findings of fact and conclusions of law, the bankruptcy court found that Swansboro had not made substantial part performance on the contract and therefore was not entitled to equitable redemption. This court will defer to the bankruptcy court's findings of fact unless shown to be clearly erroneous. *Miguel v. Walsh*, 447 F.2d 724 (9th Cir. 1971).

We are satisfied that there is nothing in this record to indicate that the bankruptcy court's finding that Swansboro had not substantially performed on the contract was clearly erroneous.

AFFIRMED.

Appendix B

In the United States District Court
For the Northern District of California

In Bankruptcy
No. 1-77-476

In the Matter of
Lumbermans Mortgage Company,
a California Corporation,
Debtor.

Lumbermans Mortgage Company,
a California Corporation,
Plaintiff,

vs.

Swansboro Country, Inc.,
formerly known as W. & D. Investment Company, Inc.,
a California Corporation,
Defendant.

[Filed May 31, 1978]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This determination is made in relation to the above entitled case in relation to certain real property located in El Dorado County, commonly known as Swansboro Country, Number 3.

As a statement of fact this Court will adopt such statements of fact as they are set forth in the Plaintiff's Open-

ing Brief filed April 26, 1978 beginning on Page 2 line 14 and continuing through Page 5 line 5.

At this point we have a question as to who is liable for real estate commissions to the salesman selling the lots. From the oral and documentary testimony brought before this Court there is no question but that the real estate salesman's commission were to be paid by the defendant and it is specifically found that W & D confirmed the balance pursuant to plaintiff's Exhibit #15. Do we have forgery or not? Even if we have a forged signature it is made by a responsible officer of the corporation and is consistent with all the books and records.

The defendants indicate plaintiff failed to cooperate in obtaining compliance with requirements of the "Interstate Land Sales Full Disclosure Act". The pertinent sections have apparently been given to this Court and they involve sections 1700.1 and 1710.11(a)(3). These sections comply with the facts and plaintiff's allegations that it is the developer who is to comply and the testimony heard before this Court indicating that the plaintiff did not want to get involved with this status of the proceedings was proper. If the defendant developer did not proceed pursuant to the regulations as required there would seem no reason for the plaintiff to become involved.

CONCLUSIONS OF LAW

1. From all of the oral and documentary testimony before this Court it is concluded as a matter of law that the plaintiff performed as far as possible pursuant to the contracts as modified.

2. It is further concluded as a matter of law that defendant defaulted substantially in relation to the performance of the contract and cannot now quarrel as to contract cancellation by the plaintiff.

3. It is further concluded that the defendant as owner and developer of the property had sole responsibility of complying with the "Interstate Land Sales Full Disclosure Act".

4. It is concluded as a matter of law from facts presented to this Court that the salesmans commissions were the responsibility of the defendant to pay.

5. With lack of substantial performance by defendant pursuant to the contract the contract is breached and whatever rights defendant might have had in relation to contract are now forfeited. With the forfeiture of the contract any possible liens or interests in the real property that exist in favor of the defendant are vacated and declared to be of no force and effect and the plaintiff should now have quiet title in relation to the balance of real property in question.

Dated: May 31, 1978

/s/ CONLEY S. BROWN

Bankruptcy Judge

Appendix C

In the United States District Court
For the Northern District of California

In Bankruptcy
No. 1-77-476
Chapter XI Proceedings

In re
Lumbermans Mortgage Company,
a California Corporation,
Debtor.

Lumbermans Mortgage Company,
a California Corporation,
Plaintiff,

vs.

Swansboro Country, Inc.,
formerly known as W. & D. Investment Company, Inc.,
a California Corporation,
Defendant.

[Filed June 23, 1978]

SUPPLEMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED MAY 31, 1978

On May 31, 1978 this Court entered its Findings of Fact and Conclusions of Law in the above entitled matter and there was duly filed objections to said findings and the

matter was set for hearing on June 15, 1978 and considerable argument was presented.

One of the findings of this Court was that the defendant was liable for the salesman's commissions and at the time of the June 15th hearing this Court indicated that from the evidence that had been presented it was adamant in relation to its position and did not desire to hear arguments. It remains the finding of this Court that the defendant is liable for the salesman's commissions. Another point that was raised again was in relation to the HUD Registration. The Court found at the end of the testimony in the original hearing that it was the defendant who had the obligation to obtain the HUD registration but the defendant reiterated that it needed plaintiff's cooperation and plaintiff's lack of cooperation essentially prevented defendant from obtaining the registration and that thus plaintiff breached the contract.

With the evidence placed before this Court at the time of hearing and the argument then given, the Court determined that it was the defendant's responsibility to get the HUD registration and this Court could not then nor does it now find that any lack of cooperation was shown by plaintiff and this Court can not then nor now find breach by the plaintiff but does find breach of lack of activity on behalf of defendant.

Counsel's most telling and extremely well presented arguments involved questions of improvement of property and substantial performance. The well presented case by the defendant was fairly well answered by attorney for the

plaintiff by going into the details of the three cases that defendant presented. Those of Barkis, Ward and MacFadden. Each one including the little old lady was a hardship type case which also generally provided for offers of complete payment at the last minute and seemed to be differentiated from the case at bar by the fact that the property in Unit 3 can not be utilized to generate substantial income at this particular time because the HUD registrations were not complied with due to the default of the defendant with no complicity in this activity by plaintiff and due to the fact that almost immediately this property is going to be sold to the State of California for unpaid taxes in the amount of $55,000.00.

It seems that the time for fooling around has ceased in relation to Unit 3 and that the Findings of Fact as originally entered and as are supplemented with the flat statement that because of the circumstances of this case substantial compliance with the contract was not given should be the ultimate finding.

Dated: June 23, 1978

/s/ CONLEY S. BROWN

Bankruptcy Judge

Opposition

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SWANSBORO COUNTRY, INCORPORATED,
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VS.

LUMBERMANS MORTGAGE COMPANY,
Respondent.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the lower courts err when they required substantial performance on the part of a willfully defaulting vendee in order to be entitled to equitable redemption of an installment land sale contract?

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No. 81-329

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OCTOBER TERM, 1981

SWANSBORO COUNTRY, INCORPORATED,
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LUMBERMANS MORTGAGE COMPANY,
Respondent.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

LUMBERMANS MORTGAGE COMPANY, the Respondent herein, prays that the petition for Writ of Certiorari, be denied:

REASON FOR DENYING THE WRIT

This case does not fall within the purview of Rule 17 of the Rules of the Supreme Court of the United States "Considerations Governing Review of Certiorari."

The appellant has erroneously interpreted the holding of the California Supreme Court in *MacFadden v. Walker,* 5 Cal.3d 809 (1971) when it states at page 4 of its petition, "that buyer of real property under a contract of sale in-

tended as a security device will be given an opportunity to cure even when substantial performance is not proven."

In fact, *MacFadden* specifically required a showing of "substantial part performance." *MacFadden v. Walker,* supra, at page 811, and citing *Barkis v. Scott,* 34 Cal.2d 116 at 121 & 122.

In *Ward v. Union Bond & Trust Company* 243 P.2d 476, at page 480, that court also held that there must be substantial performance on the part of the defaulting vendee before the doctrine of equitable redemption arises.

In this case, after a three day trial on the part of petitioner (respondent rested after introducing documentary evidence), the United States District Court for the Northern District of California, sitting as a Court of Bankruptcy, found no substantial part performance on the part of petitioner. This finding has been affirmed by two higher appellate courts.

Petitioner has not introduced any new law in his petition for Writ of Certiorari on which this Court could reach a different finding.

Appellate courts are required to accept the findings of the Bankruptcy Court unless they are clearly erroneous, *Miguel v. Walsh,* 447 F.2d 724 (1971), and both the United States District Court for the Northern District of California and United States Court of Appeals for the Ninth Circuit, after full review of the trial record reached the conclusion that the trial court's findings were not erroneous.

CONCLUSION

WHEREFORE, respondent respectfully requests that the petition for Writ of Certiorari be denied.

Respectfully submitted,

By JOHN E. MAHONEY
Attorney for Respondent